

2013 DRAFTING REQUEST

Bill

Received: 9/6/2012	Received By: chanaman
Wanted: As time permits	Same as LRB:
For: Judicial Council	By/Representing: April Southwick
May Contact:	Drafter: chanaman
Subject: Criminal Law - procedure	Addl. Drafters: phurley

Extra Copies:

Submit via email: **YES**
 Requester's email: **april.southwick@wicourts.gov**
 Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Criminal procedure rewrite

Instructions:

See attached---09-3257, 09-0228, 09-0071, 09-0070, 09-0012, 09-0068, 09-4648, 09-4635

Drafting History:

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/?	chanaman 9/19/2012	jdye 10/22/2012		_____			
/P1	chanaman 7/12/2013	kfollett 7/16/2013	rschluet 7/17/2013	_____	lparisi 10/22/2012		
/P2	chanaman 9/4/2013	kfollett 9/4/2013	phenry 9/5/2013	_____	sbasford 7/17/2013		
/P3	chanaman	kfollett	jmurphy	_____	mbarman		

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	9/11/2013	9/12/2013	9/12/2013	_____	9/5/2013		
/1				_____	sbasford	lparisi	
				_____	9/12/2013	9/13/2013	

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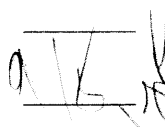


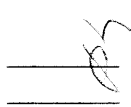
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Cathlene Hanaman

August 7, 2012

Page 2

✓ **968.055 Inquests; instructions; burden of proof and verdict**

This section contains an LRB Note asking if the cross reference to s. 971.43 is correct. The workgroup responded in the affirmative.

✓ **968.073 Recording of custodial interrogations.** This provision should be in Chapter 969. The Council suggested moving it and renumbering it s. 969.165.

968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications; and

968.30 Procedure for interception of wire, electronic or oral communications

I made no real changes here
The Council requests retention of current law in ss. 968.29 - .30 without any stylistic changes, except renumbering if necessary. These are highly technical statutes, often based on federal models, and stylistic changes that appear minor can easily change the meaning. The Council does not want to assume the burden of justifying amendments to this section that were not studied and recommended.

968.375 Subpoenas and warrants for records

On page 48, the LRB Note asks where should s. 968.375 of current law [created by 2009 Wis. Act 349] be placed? The workgroup agreed that it should be kept as s. 968.375, and would follow wiretap and precede pen register, etc. The workgroup noted that s. 968.375 appears at p. 52 of LRB- 0021/P1, following ss. 968.355 and .365. All three are misplaced – all three should go to p. 47 to precede s. 968.376. The workgroup responded to LRB Note on p. 55 by agreeing that renumbering is not required.

968.465 Application for and issuance of search warrant

Sub. (1): As drafted, it seems to unnecessarily narrow the scope of warrants. “Designated things” may not include such items as “account books” or “records related to the distribution of controlled substances” that would meet the “designated kinds of property” standard in current law. The Council confirmed that there was no intent to limit what can be seized, and approved amending “designated things” to restore current law, which states “designated property or kinds of property.” The same language should also be used in s. 968.475 to retain current law.

✓ Sub. (4): The draft says “judge” shall act with secrecy; it should require all concerned to act with secrecy. The Council approved restoration of its original proposal: “A search warrant shall be issued with all practicable secrecy...”

✓ Sub. (5) contains a new provision re: sealing a warrant. The Council recommends adding statutory authority to modify the time period to read: “A judge may order that a search warrant

and supporting documents be held under seal for a specified period of time and may extend or reduce the period for good cause shown."

968.475 Things Subject to seizure

The draft deleted s. 968.475 (3), perhaps on the assumption that it simply provided instruction regarding where to look for something else in the statutes and therefore did not add anything of substance. The Council noted that post- *Zurcher v. Stanford Daily*, documents possessed by innocent third parties must be obtained with a subpoena, not a search warrant. The Council recommended that the following proposed sub. (3) should be restored in the bill:

✓ (3) Documents under the control of a person not reasonably suspected to be concerned in the commission of a crime under s. 939.05(2) may be subpoenaed under s. 968.705.

968.485 Execution of a search warrant

✓ LRB Note asks whether sub. (3) – detention of persons present – should apply if search is for evidence, not contraband. The Council saw no basis for any distinction and recommended no change to this subsection.

968.645 Preservation of certain evidence

The Council requests retention of current law because federal funding for crime labs and DNA testing can be at stake if preservation is not handled properly. *WFO is --*

CHAPTER 969

969.20 Issuance of arrest warrant or summons

✓ LRB Note requests confirmation that the Council wanted former subsection (3) (Warrant unnecessary after arrest) deleted. That provision was a reference to an old practice that is no longer in use. The Council confirmed that former sub. (3) should be deleted.

969.25 Release by district attorney

✓ Sub. (2): The Council noted that the cross-references should be to s. 969.33(4) [not s. 969.23(3)] and to s. 969.27(6) [instead of 969.27].

969.30, Definitions

The Council requested that the definitions of "bail" and "bond" are restored and repeated here. If that is too great a departure from drafting standards, the Council alternatively requests the insertion of cross-references to the bail and bond definitions. Either way, subs. (1) and (2) should reference bail and bond. *7*

969.33 Conditions of release

✓ Sub. (7) should contain a reference to s. 969.51, instead of s. 969.41.

969.50 Bench warrant for defendant on failure to appear

The Council requests that s. 967.20 be incorporated back into s. 969.50.

The title of s. 969.50 should read: "Bench warrant for defendant or witness on failure to appear."

Throughout sub (1), references should be to defendant or witness. The phrase "...violates a term or condition of release..." should be amended to read "...violates condition of release..."

✓ Sub. (3) should reference "...a defendant or witness arrested..."

Sec. 967.19, Arrest of witness and release on bond, should be moved and renumbered as s. 969.52.

969.51 Violations of conditions of release

✓ The Council requests revising the title to read, "Revocation of defendant's release" to make it easier to locate the information.

CHAPTER 970

✓ **970.10 Dismissing the complaint.** (1) If the district attorney moves to dismiss a complaint, the trial court shall grant the motion unless the court finds that ~~any of the following is true:~~

~~(a) Dismissal is contrary to the public interest. (b) The defendant does not consent to the dismissal.~~ The motion may not be granted during the trial without the consent of the defendant.

970.15 Deferred and suspended prosecution agreements.

(3) SUSPENDED PROSECUTION AGREEMENTS. The same standards that apply to a court's authority to schedule cases and grant continuances apply to a court's authority to suspend prosecution when the parties have reached a suspended prosecution agreement. The court's authority to suspend prosecution includes the authority to defer or delay the acceptance of a plea or to withhold entry of judgment. A suspended prosecution agreement is enforceable in the same manner as a plea agreement.

CHAPTER 971

971.015 Initial court appearance

✓ The Council complied with the LRB note request to review the cross reference, and determined that it is correct.

Cathlene Hanaman

August 7, 2012

Page 5

971.03 Form of information

The information was abolished, so this section should be deleted from the draft.

971.085 Effect of plea of guilty or no contest

Sub. (1) of the draft currently reads, "A plea of guilty or no contest waives all nonjurisdictional defects and defenses except that the following may be reviewed upon appeal from a judgment of conviction." The Council requests revising the last sentence to read: "... upon appeal from a final order or judgment." This change more accurately reflects current law in light of 2009 Act 27.

971.09 Consolidation

971.09 (5) of current law addresses which jurisdiction shall pay the costs of prosecution. The draft appears to have deleted the provision. The Council requests that it be restored and placed at the end of the new section as sub. (7).

971.66 Motions to dismiss asserting that a statute is unconstitutional.

If a defendant moves to dismiss a criminal prosecution by asserting that the statute under which he or she is charged is ~~unconstitutional~~ violates the United States or the Wisconsin Constitution, the defendant must serve a copy of the motion on the attorney general under s. 806.04 (11) as well as on the district attorney.

971.69 Pretrial dismissal of complaint

Sub. (3): the words "do not" were inadvertently dropped; it should read:

(3) If the grounds stated in the motion, if true, would justify granting the dismissal motion and the allegations in the criminal complaint do not demonstrate that there is a general issue of material fact as to those grounds, the court shall . . .

CHAPTER 972

972.04 (4) Jury selection

It currently reads: "The court shall order the parties to disclose the identity of potential witnesses during jury selection if knowledge of the identity of potential witnesses is necessary for selection of an impartial jury." The Council requests that this subsection be deleted from the bill.

972.19 Stipulations

Sub. (2) currently reads: "The court shall place any stipulation that the court accepts on the record at the time the court accepts it." The Council requests restoration of the Council's original draft language to read: "Stipulations shall be set forth on the record at the time they are accepted by the court."

Cathlene Hanaman

August 7, 2012

Page 6

972.23 Dismissal of ~~additional~~ alternate jurors. (1) If the court required selection of additional jurors under s. 972.04 (1) so that alternates may be available, and, at the time the case is ~~ready for final submission~~ submitted to the jury for deliberation, the number of jurors remains greater than the number of jurors required for deliberation, the court shall determine by lot which jurors

shall not participate in deliberations ~~and discharge those jurors~~. For good cause ~~and with the agreement of the parties~~, the court may discharge additional jurors other than by lot. ~~Once discharged, a juror may not participate further in the case.~~

(2) The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

CHAPTER 974

974.08 Defendant's presence at postconviction proceedings.

(1) A defendant has the right to be present at a postconviction proceeding when the hearing will address substantial issues of fact as to events in which the defendant participated and ~~the defendant presents those issues through~~ are supported by more than mere allegations.

CHAPTER 975

6-1752 The Council noted that Chapter 975 of the draft bill does not retain current s. 971.17 (8), which makes current law applicable to offenses committed on or after Jan. 1, 1991. The Council's original draft language retained that provision. Please advise on the proper approach, and whether deletion of this provision was intentional.

975.30 Competency

Sub. (3) currently reads, "The fact that a defendant is not competent to proceed does not preclude the court from proceeding on any pretrial motion that is susceptible to fair determination without the personal participation of the defendant." The Council requests retention of current law, including the reference to s. 971.31 (which becomes s. 971.65, pretrial motions, in the draft bill), as follows: "The fact that a defendant is not competent to proceed does not preclude any legal objection to the prosecution under s. 971.31 which is susceptible of fair determination prior to trial and without the personal participation of the defendant."

975.33 Examination report

Sub. (1) currently reads, "...A report required under s. 975.32 (6) shall include all of the following: ..." The Council requests restoration of the following language from the original Council draft: "Each court-appointed examiner shall submit to the court a written report which

shall include all of the following: ..." The recommended language clarifies that reports may be ordered at different times and each report must meet all of the specifications.

Also, sub. (2) contains the term "immediately." The Council requests changing the term to "forthwith" to maintain the language found in current law. - 2.01(a)(h)

975.33 Examination report

✓ The workgroup reviewed and approved this section incorporating Act 214, in response to the LRB note.

975.34 Competency determination

✓ The workgroup reviewed and approved this section incorporating Act 214, in response to the LRB note.

975.35 Post-commitment motion on capacity

✓ The workgroup reviewed and approved this section incorporating Act 214, in response to the LRB note.

975.52 Trial of actions upon plea of not guilty by reason of mental disease or defect

✓ Sub. (2) (c) 1.: Draft eliminates language allowing jurors to determine plea even if some are no longer able to serve. The Council requests restoration of current law, as follows: "If one or more jurors who participated in determining the first plea become unable to serve, the remaining jurors shall determine the 2nd plea"

975.57 Commitment

✓ Sub. (1): The draft currently reads, "The court shall order institutional care only if it finds by clear and convincing evidence . . ." The Council requests revising the second sentence to strike "only."

Cathlene Hanaman

August 7, 2012

Page 8

The Council also requests that you please draft the bill analysis. I have included a comprehensive memo that I prepared on the major changes contained in the bill. I hope that it is helpful in preparing the analysis.

Thank you so much for your assistance with this project! Please let me know if you have any questions, or if I can be of any assistance preparing the analysis.

Sincerely,

April M. Southwick, Attorney
Wisconsin Judicial Council

PDF - 2011 Wisconsin Act 285

Date of enactment: April 12, 2012

2011 Senate Bill 399

publication*: April 26, 2012

Date of

* Section 991.11, WISCONSIN STATUTES 2009-10 : Effective date of acts. "Every act and every portion of an act enacted by the legislature over the governor's partial veto which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication as designated" by the secretary of state [the date of publication may not be more than 10 working days after the date of enactment].

2011 WISCONSIN ACT 285

AN ACT *to repeal* 908.07 and 970.03 (11); and *to create* 970.038 of the statutes; **relating to:** the admissibility of hearsay evidence at a preliminary examination.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 908.07 of the statutes is repealed.

SECTION 2. 970.03 (11) of the statutes is repealed.

SECTION 3. 970.038 of the statutes is created to read:

970.038 Preliminary examination; hearsay exception. (1) Notwithstanding s. 908.02, hearsay is admissible in a preliminary examination under ss. 970.03, 970.032, and 970.035.

(2) A court may base its finding of probable cause under s. 970.03 (7) or (8), 970.032 (2), or 970.035, in whole or in part on hearsay admitted under sub. (1).

proceeding

hearings

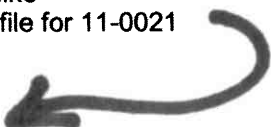
971.027(2)

971.75(3)(5)

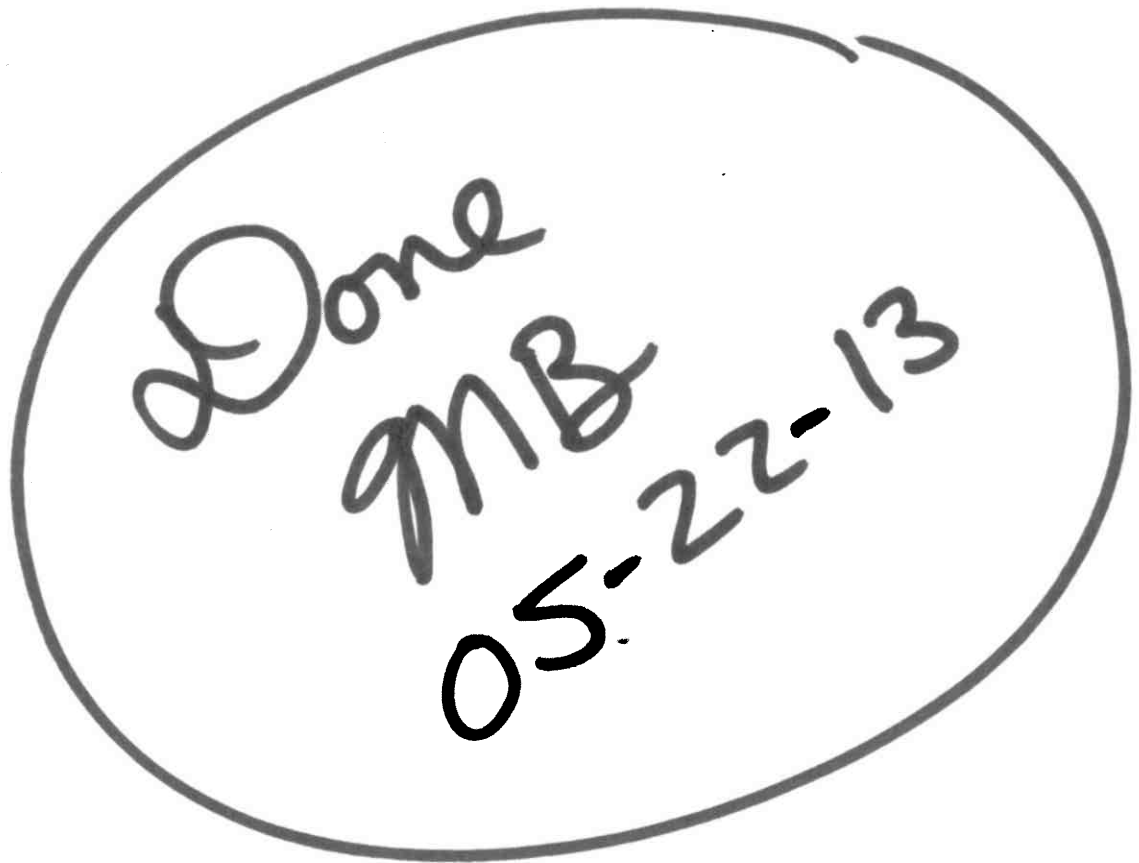
971.027(2)
971.75

Barman, Mike

From: Hanaman, Cathlene
Sent: Wednesday, May 22, 2013 11:13 AM
To: Barman, Mike
Subject: That huge file for 11-0021

Should be part of the file for 13-0031. 

Just a continuation of a long process.






State of Wisconsin


LEGISLATIVE REFERENCE BUREAU


RESEARCH APPENDIX - **PLEASE DO NOT REMOVE FROM DRAFTING FILE**


Date Transfer Requested: 05/22/2013 (Per: CMH)

Appendix ____


Appendix A  The drafting file for LRB 11-0021 (used to create 13-0031)


Appendix B  The drafting file for LRB 09-4673 (used to create 11-0021)


Appendix C  The drafting file for LRB 09-0012 (used to create 09-4673)


Appendix D  The drafting file for LRB 09-0068 (used to create 09-4673)

Appendix E  The drafting file for LRB 09-0070 (used to create 09-4673)

Appendix F  The drafting file for LRB 09-0071 (used to create 09-4673)

Appendix G  The drafting file for LRB 09-0228 (used to create 09-4673)

Appendix H  The drafting file for LRB 09-3257 (used to create 09-4673)

Appendix I  The drafting file for LRB 09-4635 (used to create 09-4673)
(includes LRB 07-3375 used to create LRB 09-4635)

Appendix J  The drafting file for LRB 09-4648 (used to create 09-4673)

has been transferred to the drafting file for

2013 LRB-0031

Hanaman, Cathlene

From: April Southwick <April.Southwick@wicourts.gov>
Sent: Friday, August 23, 2013 3:44 PM
To: Hanaman, Cathlene
Subject: Criminal Procedure Bill

Hi, Cathlene. We've finished reviewing the drafter's note, dated July 17, and all the notes embedded in LRB-0031/P2. We just have a few follow-up issues and responses.

As much as we'd love to add Judicial Council notes explaining some of the changes, unfortunately we really don't have enough time at this point. It's too bad the original drafters dropped all of our notes. (Yes, the draft that we originally provided to LRB contained many Judicial Council notes.)

We have the following requested changes and responses:

1. 968.475(3) -- Please restore the Council's original language to s. 968.475 (3): "Documents under the control of a person not reasonably suspected to be concerned in the commission of a crime under s. 939.05(2) may be subpoenaed under s. 968.705." Do not attach it to s. 968.075.
2. 968.645, preservation of certain evidence -- The work group previously discussed this and directed that current law should be left alone, primarily because this was part of DNA legislation that was subject to extensive discussion and compromise. Gratuitous changes -- or changes requested by parties who were not part of the Council's process -- should not be made.
3. 969.26 (3), form -- Yes, the location of "other" is correct as an addition to the maximum penalty section.
4. 971.027 (6) and (7) relating to obtaining ID and DNA -- Council records indicate that the LRB made the redrafting changes to sub. (6) on their own initiative, not at Council request. Sub. (7), which hasn't even gone into effect yet, should not be revised to mirror sub. (6).
The changes to both subsections are gratuitous and the Council doesn't want to have to defend them to the Legislature if asked. Please retain current law in both subsections.
5. 975.49, with regard to the note on p. 277: I believe our committee didn't care about the applicability section and told LRB it was up to them whether to include it. Several of us do not think it is even necessary -- there are no applicability sections in many other places in the statutes. However, including it and renumbering as .50 is fine, unless that means renumbering everything that follows and leads to another round of Notes re: "confirm these cross-references." If another round of notes and further cross-reference questions will result, then please leave it as is.

All of the notes have been reviewed and can be removed. We are still working through the analysis and have a committee meeting to finalize it on Sept. 9th. Rep. Ott's office has set a final completion deadline of Sept. 13 so that it is ready for introduction on the 16th.

If you have any questions, just let me know. I'll be on vacation next week. I'll be checking my messages, but my response time may be slow.

:)

Have a great weekend!

April